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August 1, 1952

Honorable Olin D. Johnson, Chairman
Committee on Post Office and Civil Service
United States Senate

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My dear Chairman:

Reference is made to your letter of July 11, 1951, acknowledged by telephone July 13, requesting a report upon S.1820 entitled "A Bill to promote the rescue of civilian employees of the Federal Government who are lost in the performance of their official duties, to continue salary payments of such employees, and for other purposes".

As distinguished from the Missing Persons Act, as amended, 50 U.S.C., War App., Section 1001, now in effect by reason of Section 4(e) of the Selective Service Act of 1948, 62 Stat. 608, the definition of the term, "person", in section 1(a) of the bill would serve to include officers and employees performing duty in continental U.S. or in Alaska. The inclusion of part-time or intermittent employees seems appropriate. However, in order to eliminate doubt that the term "native labor", refers only to natives employed outside continental U.S. and in order not to include natives regularly employed upon an hourly or per diem basis, the last clause of subsection (a) might be changed, in line with the definition in the Missing Persons Act, as amended, supra, to read: "or native labor outside the continental limits of the U.S. or in Alaska casually ^{hired} upon an hourly or per diem basis".

The definition of the term, "department", in section 1(b), together with the definition of the term, "person", in subsection (a), would have the effect of excluding officers and employees in the legislative and judicial branches of the Government. It is conceivable that under certain circumstances those officers and employees might be subjected to the same peril as officers and employees in the executive branch and should not be excluded.

The exclusion by section 1(c) of temporary allowances from the definition of "pay and allowances" appears to be proper. 27 Comp. Gen. 205.

In the cases of persons who are officially determined to be absent in a missing status and who later reappear, the provisions of section 2 would have the effect of providing a statutory basis for crediting the pay and allowances of such persons for the periods of absence, and under Section 4, the period for so crediting pay and allowances could not exceed 90 days. Subject to reconciliation with the conflicting provisions of the Missing Persons Act, as amended, supra, which are now in force, this Office perceives no objection to legislation to that effect.

In the cases of persons who are officially determined to be absent in a missing status and who later are found or determined to be dead, sections 2 and 4 of the bill would imply a conclusive presumption, quite apart from what may be the actual facts, that an employee who first is determined to be absent in a missing status continued to live until the date of receipt of evidence of his death if received not more than 30 days from the date of commencement of the missing status; and the date to which such employee would be presumed to have lived could be extended for another 60 days if no word of him had been received in the meantime. It may be conceded that there will be a few cases where the actual date of death or even the fact of death, will be difficult to establish as a matter of precise knowledge. However, it is believed that the actual date of death may be established with reasonable certainty (for example, by the testimony of survivors who actually witnessed the event or by evidence indicating the encounter of some peril which reasonably could be expected to destroy life) in the great majority of cases. I seriously doubt that the few cases of the type first mentioned should be the reason for continuing, in all cases, pay and allowances beyond the actual date of death. Enactment of the proposed legislation in its present form would result in discrimination in favor of the estates of employees who ~~meet~~ ^{meet} their death under circumstances administratively deemed to have justified their being carried in a missing status and against the ~~status~~ ^{estates} of employees who are killed in the course of employment under circumstances where their deaths are known at once. Whatever the justification for similar legislation such as the Missing Persons Act, as amended, addressed to wartime or warlike conditions, it is submitted that permanent legislation applicable alike in war or peace is difficult to justify. As bearing upon the foregoing, the following is quoted from page 4, House Report No. 1674 upon H.R. 4405, 78th Congress, 2nd Session, which became Public Law 408, 78th Congress, approved July 1, 1944, effecting certain amendments to the Missing Persons Act:

"The normal peacetime concept is that no pay can accrue after death. But this act does not deal with normal conditions; it must adjust to the abnormalities of the present war."

Enactment of the legislation here proposed would perpetuate a wartime aberration. It may be that legislation authorizing administrative officers to make presumptive death findings and to fix the date of death in the cases of missing employees whose bodies are not found or, if found, whose date of death is uncertain, would serve the useful purpose of providing a definite date for termination of compensation and other perquisites attached to the office or employment of the person involved and a basis for payments to distributors under the act of August 3, 1950, Public Law 626, 81st Congress; nevertheless, it is my view that the date of death should be required to be fixed upon a basis commensurate with the realities of a particular situation and not made to depend upon the fortuitous circumstance of the date of receipt by the department concerned of evidence of death. Adoption of that view would negate also the arbitrary fixing of the date of death (P-3) as the

date following the expiration of a 30-day period, as would be provided by section 4. A case which will illustrate the foregoing is one which has been brought to the attention of this Office, in support of the need for legislation of the nature here under consideration, involving a Civil Aeronautics Administration aircraft with three employees aboard which disappeared on January 21, 1948, in the course of a flight from Denver to Grant Junction, Colorado, but which was not found until May 23, 1948. It appears that the employees involved were, Ross C. Brown, Fred L. Snively, and Warren L. Lungstrum. The vouchers covering travel expense items submitted here in support of the claims of the widows for the amounts due two of the decedents stated simply that "Patrol Aircraft NC206 crashed about 20 minutes after take-off. All occupants of this aircraft were killed on official duty." All of the vouchers covering accrued compensation and lump-sum payments for leave bore the notation: "Death EFF COB 1/21/48." Thus, while the bodies were not recovered for some time after the crash of the aircraft, there appears to have been no doubt, when recovered, but that death occurred on the date of the crash. If the provisions of the legislation here proposed had been in effect, the employees would have been presumed to have lived for at least an additional 30 days and pay and allowances credited accordingly.

It is noted that the expression, "official report of death," is used in the first sentence of section 4. The proposed legislation does not provide for or otherwise define "official report of death", and, therefore, the meaning of such expression is not clear. In that connection, it is observed that the expression "evidence that the employee is dead" is used in section 2.

Section 2 would provide, in addition to the matters hereinbefore discussed, that the right of a person in a missing status to pay and allowances shall not terminate upon expiration of term of service during absence and in case of death during absence, shall not terminate earlier than the dates therein prescribed. There would be no right to pay and allowances for any period during which an employee may be officially deemed absent from his post of duty without authority and he would be indebted to the Government for any payments from amounts credited to his account for such period. Those provisions appear to be desirable if the proposed legislation otherwise is to receive favorable consideration.

Section 3 would provide that when in the opinion of the head of the department concerned circumstances are such as to justify such action in the interest of the person entitled to receipt of, or entitled to be credited with, pay and allowances under section 2, the head of such department is authorized to pay all such pay and allowances in the order of precedence specified therein.

With respect to the first class of payees ("dependent or dependents" designated to receive unpaid compensation, etc., due at date of death), it should be noted that the Act of August 3, 1950, supra, authorizes the

designation of a "beneficiary or beneficiaries " to receive unpaid compensation, etc.. It would appear, therefore, that a determination that the designated person is a dependent would be required before any payment could be made to such person under section 3. Since one of the primary purposes of the proposed legislation is to relieve the hardship to which the dependents of lost employees may be subjected, it would seem to be desirable to limit payments to dependent relatives; however, no showing would be required that the other classes of payees are dependent upon the missing person for support and, except perhaps in the case of a wife or minor child, no presumption as to dependency would arise. Enactment of section 3 in its present form would create a situation whereby, if designated as a beneficiary under the act of August 3, 1950, a relative of the second, third, or fourth class would have to show dependency in order to be eligible to receive the credited pay and allowances of a missing employee, but if not so designated, would not be required to show dependency. Furthermore, in view of the time which would be required to investigate the necessities of a particular case and since it could be expected that in a great many instances a missing person will have reappeared after a comparatively brief absence, there is more than a remote possibility that there will be cases in which the purpose of the proposed legislation would be defeated or, if payments under section 3 have been initiated, that such payments will operate to the detriment of the person who had disappeared. While the order of precedence set forth in said section 3 follows, up to a certain point, that prescribed by the act of August 3, 1950, and in the event the missing person is found or determined to be dead, no conflict would arise between distribution of unpaid compensation which accrued prior to commencement of the missing status and pay and allowances which would accrue under the proposed legislation (assuming that the designated beneficiary is able to show dependency), nevertheless, if the missing person did not meet his death but later reappeared, there can be foreseen the possibility that sums paid to payees, as prescribed in section 3, might not have been applied in accordance with the missing person's desires or necessities, particularly when the missing person had executed a conflicting allotment of pay pursuant to the act of May 14, 1937, 50 Stat. 166, or other statutory authority. There also arises the question of the wisdom of payments directly to minors (or) others under legal disability. It is noted that section 3 would make no provision for retirement deductions or income tax withholding, which would be appropriate if the missing person is alive; nor does it provide for disposing of the credited pay and allowances in the event that the missing person is deceased and there are no payees of the classes enumerated.

It seems to me that the matter resolves itself into one not so much of providing for additional money credits but of making immediately available to dependents cash payments or benefits already provided by law. Accordingly, if it is the sense of your Committee that the Government should assume the obligation of immediately providing for dependents of missing employees, it is suggested that the provision might be made for payments to dependents along the lines of those provided by Sections 1 and 10 of the Employees Compensation Act of September 7, 1916, as amended, 5 U. S. C. 751, 760, when an employees death results from personal injuries sustained while in the performance of his duty. I think it safely can be assumed that in

nearly all cases of employees who die as a result of an incident giving rise to an official missing status, death will have occurred under circumstances for which compensation is provided for dependents by the 1916 act, as amended. In cases where the missing employee reappears, the interim payments can be charged against accrued pay, and if the employee is found to be dead, the payments may be considered as in discharge pro tanto of the Government's obligation under the 1916 act, as amended. In connection with the foregoing, it may be stated that the information here is to the effect that dating from January 22, 1948, the widow of one of the Civil Aeronautics administration employees who died in the plane crash discussed above has been paid some \$7,400 under the 1916 act, as amended, as of May 31, 1951; the widow of another, some \$8,000; and the widow of the other some \$8,600. A provision for an accelerated date for commencement of death compensation payments would have ameliorated the hardship occasioned dependents.

Section 5 of the bill appears to be modeled after Section 9 of the Missing Persons Act, as amended, 50 U. S. C., War App., Section 1009. The intended meaning of the first sentence thereof, providing that the determination of the head of the department concerned shall be conclusive as to whether information received concerning any employee is to be construed and acted upon "as an official report of death," is not clear. See the comment above regarding the expression, "official report of death," in Section 4. The same may be said of the second sentence of section 5, which would provide that when any information deemed to establish conclusively the death of any employee is received by a department, action shall be taken thereon "as an official report of death," notwithstanding any prior action relative to death or other status of such person. A provision which would authorize a change in the records to give effect to later more accurate information would not be objectionable. (X)

If the bill otherwise is to receive favorable consideration, no objection is seen to the first part of the third sentence of section 5 which would provide that payment or settlement of an account made pursuant to a report or finding of death shall not be recovered or reopened by reason of a subsequent report or determination which fixes the date of death. However the qualification "except that an account shall be reopened and settled upon the basis of any date of death so fixed which is later than that used as a basis for prior settlement" is objectionable in that it would be in conflict with the provisions of section 4 which limit the period of entitlement to 90 days. I see no objection to the proviso in this sentence relative to recrediting amounts paid out where payments are induced by fraud or misrepresentation.

The provisions of the fourth sentence of section 5 authorizing reconsideration and change or modification of a previous determination appear to be desirable in the interest of the Government as well as the other parties who would be affected by the proposed enactment.

Since the fifth sentence of section 5 applied to deceased persons it would seem to be inaccurate to refer to the right of the person to receive pay and allowances, having in mind the usual concept that death marks the termination of a person's rights. Also, since the payments to the payees designated in section 3 are not allotment payments, the word, "allottee,"

appears to be inappropriate. In any event the entire sentence appears to be surplusage since section 2 specifically would provide for crediting pay and allowances up to the date of the receipt of evidence of death, including periods of delay within the limits of section 4. The sentence in question appears to be modeled after certain provisions of section 9 of the Missing Persons Act, as amended, which were included for the purpose of removing doubt in connection with allotment payments made in the interim between the actual date of death and date of the receipt of evidence thereof (pages 9 and 10 of House Report No. 1674, supra), which situation would not arise in the present matter.

The sixth sentence of section 5 would authorize the head of the department concerned to waive the recovery of erroneous payments to dependents when recovery is determined to be against equity and good conscience. Use of the word, "dependents," is open to question when reference is made to the terms of section 3. However, the obvious purpose is unobjectionable.

The last sentence of section 5 relates to the relief of certifying and disbursing officers. The purpose of the statutes covering the disbursement of Government moneys is to require certifying and disbursing officers to exercise the highest degree of care and caution in the expenditure of public funds. There appears no reason why such purpose should be overlooked with respect to payments such as would be made under the bill, and, accordingly, I would recommend that the sentence be stricken if the proposed legislation should receive favorable consideration.

Section 6 contains certain proposed penal provisions, as to which this Office has no comment.

Section 7 would authorize the head of a department to incur expenses, by contract or otherwise, without regard to the provisions of section 3709 of the Revised Statutes, as amended, in connection with the search for civilian employees of the Federal Government lost in the performance of their official duties and to pay rewards not exceeding \$1,000 in the aggregate in any one instance for information leading to the finding of any civilian employee of the Federal Government, whether or not alive, lost in the performance of his official duties, with the proviso that no such compensation or reward shall be paid to any employee of the Federal Government, of any State or local government, or to any member of the military service of any State or the Federal Government assigned to such search and rescue. No objection is perceived to such provisions.

Finally, section 8 of the bill would authorize the head of the department concerned to delegate the authority devolving upon him under the proposed enactment. In view of the trend in recent statutes to permit the delegation of authority by heads of departments, it might be said that there should be no objection to permitting such delegation in the instant matters; however, since the legislation here proposed would, if enacted into permanent law, be administered over the years by a constantly changing body of officers and employees of varying experience, capacity and character in each of the departments, independent establishments and agencies concerned, there is suggested the desirability of providing for top-level administration thereof. There also is suggested the desirability of providing for issuance of regulations

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by the President for the purpose of securing as uniform administration as is possible under the circumstances.

Except to the extent hereinabove indicated, I strongly recommend against enactment of the proposed legislation.

Sincerely yours,

S/

LINDSAY C. WARREN
Comptroller General
of the United States.